IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BUDDY R. RICHARDS, Appellant.	No. 32921-2-II UNPUBLISHED OPINION

Armstrong, J. – Buddy Raymond Richards appeals his conviction of first degree malicious mischief,[1] arguing that insufficient evidence supports his conviction, the information failed to allege the necessary elements, the jury instructions were incorrect, the prosecutor committed misconduct, and counsel failed to provide effective assistance of counsel. We affirm.

Facts

On November 3, 2004, Richards was an inmate in the Mason County Jail housed in the "N" cell block area, an ultra max security cell block. Inmates housed in the "N" cell block are allowed out of their cells for one hour each day into a day room.[2] There they can watch television, make telephone calls, take a shower, or exercise.

Richards's hour began at 11:00 that morning. Shortly thereafter, he began yelling and did not respond to requests from Ed Smith, the control room operator, to quiet down.[3] After three or four such requests, Smith told Richards to quiet down or he would shut off the television.

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[1] A violation of RCW 9A.48.070(1)(b).

[2] They can earn two hours for two weeks of good behavior.

[3] Smith was in a locked control room and communicated with Richards through an intercom and observed him through the glass windows or by remote cameras.

Richards responded, "F**k you." Report of Proceedings (RP) at 39. When Richards continued to yell, pace, and raise his arms in the air, Smith shut off the television. Richards then began yelling louder, walked directly toward the television, and shoved it off the wall-mounted stand, sending it crashing to the floor.

Smith immediately called for help, fearing the shards from the broken television could be used as weapons and that a potential electrocution could occur. Smith continued to yell at Richards to go to "lock down," a phrase meaning that he should return to his cell and close the door. RP at 45. Richards did not heed these commands and when other officers entered the control room, he responded with a middle-finger gesture.

Jason Benedict, a corrections officer in the control room with Smith at the time, described Richards's response when Smith shut off the television: "Inmate Richards responded from - I'd say - ten feet behind the television walking toward the television and pushed it off the -- pushed the television. It fell off the stand." RP at 67. When asked if it was accidental, Benedict said, "No, it was pushed. . . . The television was pushed. It was not an accident." RP at 68.

The State charged Richards with first degree malicious mischief under the theory that "[he] did knowingly and maliciously cause an interruption or impairment of service rendered to the public by physically damaging or tampering with property of the state or a political subdivision thereof, contrary to RCW 9A.48.070(1)(b)." Clerk's Papers (CP) at 47.

At trial, Tom Haugen, the jail superintendent, testified that the Mason County Jail has 29 staff, who are responsible for all day-to-day activities. At 11:00 a.m., on November 3, 2004, the staff would have been busy with bookings, releases, and transports, among other activities. When Smith's call for help came, all staff working at that time had to leave their duties and go to the "N" block to assist. He explained that the event

caused delays in inmate transports from Western State Hospital and to and from the courts. The "N" block was shut down for nearly two hours so other inmates were unable to leave their cells for their designated hour. Further, because it took until November 19 to get a new television, the inmates could not use the television for those two weeks. And because the transports were delayed, once they resumed they ran into the lunch hour, delaying lunch service and creating increased tension among the inmates. Haugen also explained that providing court transports is a service the jail normally offers to the courts and the general public.

Deputy Petraitis, one of the responding officers, testified that Richards said that he was frustrated because someone had pushed his buttons and he got mad and pushed the television off the shelf.

Sergeant Bruce Bennett, the jail co-supervisor, also responded to the incident. He explained that 8 to 10 staff responded, including 2 sergeants, that he had 8 transports to district court that morning, and that the district court was delayed for the rest of that morning. When Bennett arrived, the television was in pieces on the floor and Richards was yelling incoherently and "flipping the bird" with both hands at the responding officers. RP at 112. Bennett and two others cleaned up the room after securing Richards in his cell. He explained that the incident caused an interruption and impaired the jail staff's ability to do its job. He also explained that the jail was less secure because the staff were involved for 45 minutes in handling the incident.

Before closing arguments, the State objected to the court's instruction number 10,[4]

[4] Instruction 10 provided:

> The crime of first degree malicious mischief with respect to public property requires an intent to interrupt public service and not merely an intent to cause physical damage which results in such an interruption.

CP at 32.

arguing that it misstated the State's burden of proof by requiring the State to prove that Richards intended to cause an interruption in services. The State argued that it needed only to prove that Richards intended to damage physical property. The court rejected this argument based on *State v. Jury*, 19 Wn. App. 256, 576 P.2d 1302 (1978), reasoning that the State had to prove that the defendant maliciously intended to damage physical property in order to cause an interruption of services.

Nonetheless, during closing argument the State told the jury:

> And with all due respect to counsel, I think that his reference to Instruction No. 10 is a little bit misleading in the sense that the elements that we talked about don't require intent and don't talk about intent. What it talks about is knowingly and maliciously. And that is . . . knowingly and maliciously causing an interruption or impairment of service. Not necessarily the knowingly damaged or tampered with the property by physically damaging it, but knowingly and intentionally -- excuse me -- knowingly and maliciously caused an interruption or impairment to the service. Not intent. It's not an additional element that the State has to prove.

RP at 159. The jury found Richards guilty and the court imposed a standard range sentence. He now appeals.

Analysis

I. Sufficiency of the Evidence.

Richards first argues that the State failed to prove that he intended to cause an interruption or impairment of public service as is required under *Jury*. He acknowledges that he broke the television out of anger but argues that inferring an intent to interrupt or impair public services requires an improper pyramiding of inferences. *See State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing

the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citations omitted). We defer to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992) (citations omitted).

Under this standard, we resolve all inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985). An inference is a logical deduction or conclusion that the law allows, but does not require, following the establishment of the basic facts. *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989) (quoting 5 K. Tegland, Wash. Prac., Evidence § 65, at 127-28 (2 ed. 1982)).

Applying this standard, we find sufficient evidence to uphold the conviction. The established facts are that (1) Richards was angry and yelling; (2) Ed Smith told him to quit yelling or he would shut off the television; (3) Richards responded, "F**k you;" (4) Smith shut off the television when Richards continued his tirade; and (5) Richards immediately and deliberately destroyed the television set when Smith shut it off. It is both logical and reasonable to infer from these facts that Richards's anger was directed at Smith and the jail; that he destroyed the television to retaliate against Smith and the jail; and that his attitude was, as the State describes it, "if I can't watch TV, no one will." Br. of Respondent at 4. We need not pyramid inferences to conclude that Richards intended to impair or interrupt jail services.

II. Adequacy of the Information.

Richards also contends that the charging document failed to apprise him of the essential element of intent to interrupt or impair public services.

Article 1, section 22 of the Washington

Constitution provides in part: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." Amendment VI of the United States Constitution provides in part: "In all . . . prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." CrR 2.1(1) provides in part that "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

"[T]he 'essential elements' rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged." *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). It is sufficient to charge in the language of the statute if the statute defines the offense with certainty. *State v. Elliott*, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (citing *Leach*, 113 Wn.2d at 686). The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991) (citing 2 W. LaFave & J. Israel, Criminal Procedure § 19.2, at 446 (1984); 1 C. Wright, Federal Practice § 125, at 365 (2d ed. 1982)). All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be properly prepared. *Kjorsvik*, 117 Wn.2d at 101-02.

When the adequacy of the information is challenged for the first time after verdict or on appeal, we ask two questions: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language that caused a lack of notice. *Kjorsvik*, 117 Wn.2d at 105-06; *see State v. Phillips*, 98 Wn. App. 936, 939-42, 991 P.2d 1195 (2000) (explaining reasons for different standard

of review in post-verdict challenge).

The charging document provided that Richards "did knowingly and maliciously cause an interruption or impairment of service rendered to the public by physically damaging or tampering with property of the state or a political subdivision thereof, contrary to RCW 9A.48.070(1)(b)." CP at 47.

That statute provides:

> (1) A person is guilty of malicious mischief in the first degree if he knowingly and maliciously:
> . . . .
> (b) Causes an interruption or impairment of service rendered to the public by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.070(1)(b). Obviously, the charging document followed this exact language and would past muster even under a strict construction. *Jury* did not create an additional element of the offense. *Jury*, 19 Wn. App. at 266-67. Rather, there, the court erred in giving a to-convict instruction that required that the State prove only that the defendant knowingly and maliciously caused physical damage and that the damage caused an interruption or impairment of public services. *Jury*, 19 Wn. App. at 267. The harm, this court explained, was that it required the State to prove the scienter for third degree malicious mischief, not first degree. *Jury*, 19 Wn. App. at 267.

The charging document here sufficiently apprised Richards of the essential elements of the offense.

III. Jury Instructions

Richards next argues that the court's instructions to the jury did not require proof beyond a reasonable doubt that Richards knowingly and

maliciously caused an impairment or interruption of public services. We disagree.

Instructions are proper if, when read as a whole, they are readily understood, not misleading to the ordinary mind, and sufficiently clear. A further test is whether the instructions given allow counsel to satisfactorily argue his theory of the case to the jury. *State v. Hardy*, 44 Wn. App. 477, 480-81, 722 P.2d 872 (1986) (citing *State v. Dana*, 73 Wn.2d 533, 439 P.2d 403 (1968)). As long as instructions inform the jury of all the elements of the crime charged, there is no constitutional error. *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988) (*State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)).

Here, instruction 6 defined "knowingly;" instruction 7 defined "maliciously;" instruction 8 defined first degree malicious mischief using the phrase "knowingly and maliciously causes an interruption or impairment;" instruction 9, the to-convict instruction, required that a defendant have "caused an interruption or impairment . . . by physically damaging. . . [t]hat the defendant acted knowingly and maliciously;" and, finally, instruction 10 explained that the charged offense "requires an intent to interrupt public service and not merely an intent to cause physical damage which results in such an interruption." CP at 28-32. These instructions, read as a whole, were sufficiently clear to not mislead the jury about the proper standard of proof. We also doubt that the prosecutor's closing argument, which we discuss in more detail below, altered the jury's understanding of these instructions. The record demonstrates that the instructions allowed defense counsel to argue during closing that the State failed to prove an intent to impair or interrupt public services. We find no error.

IV. Prosecutorial Misconduct

Richards next argues that the prosecutor committed misconduct in closing argument when she argued that the State need only prove that

he maliciously caused physical damage that resulted in an impairment or interruption of services.

If a defendant fails to object to improper comments at trial, request a curative instruction, or move for a mistrial, we will not reverse unless the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). We must reverse for prosecutorial misconduct when there is a substantial likelihood that the argument affected the jury verdict. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). The defense has the burden of proving such prejudice. *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986).

The State concedes that the challenged argument was improper but argues that it was not flagrant or ill-intentioned and certainly did not affect the jury verdict. We agree.

We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). On reading the prosecutor's argument, we find the argument confusing at best and in our view, the jury probably disregarded it because it did not understand it. Where the court's instructions were clear and properly apprised the jury of the State's burden of proof, we doubt that this confusing argument, preceded by defense counsel's very clear argument, overcomes the presumption that the jury followed the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

V. Ineffective Assistance of Counsel

Lastly, Richards argues that his counsel was ineffective for proposing an instruction identical to instruction 10 and failing to procure

an instruction properly setting out the State's burden of proof. He also faults defense counsel for not objecting to or asking for a curative instruction during the prosecutor's closing argument.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

As we find that the court's instructions properly stated the law and that the prosecutor's argument did not affect the verdict, Richards's ineffective assistance claim fails because he cannot show prejudice.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Houghton, P.J.

Penoyar, J.